SUPREME COURT OF THE UNITED STATES

Nos. 30 and 31.—October Term, 1968.

James C. Kirkpatrick, Secretary of State of Missouri, et al., Appellants, 30 v. Paul W. Preisler et al.	On Appeals From the United States District Court for the Western District of Missouri.
F. V. Heinkel et al., Appellants, 31 v. Paul W. Preisler et al.	

[April 7, 1969.]

Mr. Justice Brennan delivered the opinion of the Court.

In *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), we held that "[w]hile it may not be possible [for the States] to draw congressional districts with mathematical precision," *id.*, at 18, Art. I, § 2 of the Constitution requires "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.*, at 7–8. We are required in this case to elucidate the "as nearly as practicable" standard.

The Missouri congressional redistricting statute challenged in this case resulted from that State's second attempt at congressional redistricting since *Wesberry* was decided. In 1965, a three-judge District Court for the Western District of Missouri declared that the Missouri congressional districting Act then in effect was unconstitutional under *Wesberry* but withheld any judicial relief "until the Legislature of the State of Missouri has once more had an opportunity to deal with the problem . . . ." *Preisler* v. *Secretary of State of Missouri*, 238 F. Supp. 187, 191 (1965). Thereafter, the General Assembly of Missouri enacted a redistricting statute, but this statute too was declared unconstitutional. The District Court, however, retained jurisdiction to review any

further plan that might be enacted. *Preisler* v. *Secretary of State of Missouri*, 257 F. Supp. 953 (1964), aff'd, *sub nom. Kirkpatrick* v. *Preisler*, 385 U. S. 450 (1967). In 1967, the General Assembly enacted the statute under attack here, Mo. Rev. Stat., c. 128 (Cum. Supp. 1967), and the Attorney General of Missouri moved in the District Court for a declaration sustaining the Act and an order dismissing the case.

Based on the best population data available to the legislature in 1967, the 1960 United States census figures, absolute population equality among Missouri's 10 congressional districts would mean a population of 431,981 in each district. The districts created by the 1967 Act, however, varied from this ideal within a range of 12,260 below it to 13,542 above it. The difference between the least and most populous districts was thus 25,802. In percentage terms, the most populous district was 3.13% above the mathematical ideal, and the least populous was 2.83% below.[1]

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[1] The redistricting effected by the 1967 Act, based on a population of 4,319,813 according to the 1960 census, is as follows:

District No.	*Population.*	*% Variation From Ideal.*
One	439,746	+ 1.8
Two	436,448	+ 1.03
Three	436,099	— .95
Four	419,721	— 2.84
Five	431,178	— .19
Six	422,238	— 2.26
Seven	436,769	+ 1.11
Eight	445,523	+ 3.13
Nine	428,223	— .87
Ten	423,868	— 1.88
Ideal population per district		431,981
Average variation from ideal		1.6%
Ratio of largest to smallest district		1.06 to 1
Number of districts within 1.88% of ideal		7
Population difference between largest and smallest districts		25,802

The District Court found that the General Assembly had not in fact relied on the census figures but instead had based its plan on less accurate data. In addition, the District Court found that the General Assembly had rejected a redistricting plan submitted to it which provided for districts with smaller population variances among them. Finally, the District Court found that the simple device of switching some counties from one district to another would have produced a plan with markedly reduced variances among districts. Based on these findings, the District Court, one judge dissenting, held that the 1967 Act did not meet the constitutional standard of equal representation for equal numbers of people "as nearly as practicable," and that the State had failed to make any acceptable justification for the variances. 279 F. Supp. 952 (1967). We noted probable jurisdiction but stayed the District Court's judgment pending appeal and expressly authorized the State "to conduct 1968 congressional elections under and pursuant to [the] 1967 . . . Act . . . ." 390 U. S. 939 (1968). We affirm.

Missouri's primary argument is that the population variances among the districts created by the 1967 Act are so small that they should be considered *de minimis* and for that reason to satisfy the "as nearly as practicable" limitation and not to require independent justification. Alternatively, Missouri argues that justification for the variances was established in the evidence: it is contended that the General Assembly provided for variances out of legitimate regard for such factors as the representation of distinct interest groups, the integrity of county lines, the compactness of districts, the population trends within the State, the high proportion of military personnel, college students, and other nonvoters in some districts, and the political realities of "legislative interplay."

I.

We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the "as nearly as practicable" standard. The whole thrust of the "as nearly as practicable" approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district. Since "equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives," *Wesberry* v. *Sanders*, *supra*, at 18, the "as nearly as practicable" standard requires that the State make a good-faith effort to achieve precise mathematical equality. See *Reynolds* v. *Sims*, 377 U. S. 533, 577 (1964). Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.

There are other reasons for rejecting the *de minimis* approach. We can see no nonarbitrary way to pick a cutoff point at which population variances suddenly become *de minimis*. Moreover, to consider a certain range of variances *de minimis* would encourage legislators to strive for that range rather than for equality as nearly as practicable. The District Court found, for example, that at least one leading Missouri legislator deemed it proper to attempt to achieve a 2% level of variance rather than to seek population equality.

Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes. Therefore, the command of Art. I, § 2,

that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.

Clearly, the population variances among the Missouri congressional districts were not unavoidable. Indeed, it is not seriously contended that the Missouri Legislature came as close to equality as it might have come. The District Court found that, to the contrary, in the two reapportionment efforts of the Missouri Legislature since *Wesberry* "the leadership of both political parties in the Senate and the House were given nothing better to work with than a makeshift bill produced by what has been candidly recognized to be no more than . . . an expedient political compromise." 279 F. Supp., at 966. Legislative proponents of the 1967 Act frankly conceded at the District Court hearing that resort to the simple device of transferring entire political subdivisions of known population between contiguous districts would have produced districts much closer to numerical equality. The District Court found, moreover, that the Missouri Legislature relied on inaccurate data in constructing the districts, and that it rejected without consideration a plan which would have reduced markedly population variances among the districts. Finally, it is simply inconceivable that population disparities of the magnitude found in the Missouri plan were unavoidable.[3] The New York apportionment

[3] Contrary to appellant's assertion, we have not sustained the constitutionality of any congressional districting plan with population variances of the magnitude found in the Missouri plan. In *Connor* v. *Johnson*, 386 U. S. 483 (1967), the only issue presented to this Court was whether the districting plan involved racial gerrymandering. *Alton* v. *Tawes*, 384 U. S. 315 (1966), and *Kirk* v. *Gong*, 389 U. S. 574 (1968), involved situations where the lower courts themselves had reapportioned the districts on an emergency basis,

plan of regions divided into districts of almost absolute population equality described in *Wells* v. *Rockefeller*, *post*, at ——, provides striking evidence that a state legislature which tries can achieve almost complete numerical equality among all the State's districts. In sum, "it seems quite obvious that the State could have come much closer to providing districts of equal population than it did." *Swann* v. *Adams*, 385 U. S. 440, 445 (1967).

We therefore turn to the question whether the record establishes any legally acceptable justification for the population variances. It was the burden of the State "to present . . . acceptable reasons for the variations among the populations of the various . . . districts . . . ." *Swann* v. *Adams*, *supra*, at 443–444.

II.

We agree with the District Court that Missouri has not satisfactorily justified the population variances among the districts.

Missouri contends that variances were necessary to avoid fragmenting areas with distinct economic and social interests and thereby diluting the effective representation of those interests in Congress. But to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people. "[N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes." *Reynolds* v. *Sims*, *supra*, at 579–580. See also *Davis* v. *Mann*, 377 U. S. 678, 692 (1964).

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and our affirmances were based on agreement with the use of the plans in that circumstance, and not on any view that the plans in question achieved equality as nearly as practicable.

We also reject Missouri's argument that "[t]he reasonableness of the population differences in the congressional districts under review must . . . be viewed in the context of legislative interplay. The legislative leaders all testified that the act in question was in their opinion a reasonable legislative compromise. . . . It must be remembered . . . that practical political problems are inherent in the enactment of congressional reapportionment legislation."[3] We agree with the District Court that "the rule is one of 'practicability' rather than political 'practicality.'" 279 F. Supp., at 989. Problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster.

Similarly, we do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries. The State's interest in constructing congressional districts in this manner, it is suggested, is to minimize the opportunities for partisan gerrymandering. But an argument that deviations from equality are justified in order to inhibit legislators from engaging in partisan gerrymandering[4] is no more than a variant of the

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[3] Brief for Appellants, at 37–38.

[4] It is dubious in any event that the temptation to gerrymander would be much inhibited, since the legislature would still be free to choose which of several subdivisions, all with their own political complexion, to include in a particular congressional district. Besides, opportunities for gerrymandering are greatest when there is freedom to construct unequally populated districts. "[T]he artistry of the political cartographer is put to its highest test when he must work with constituencies of equal population. At such times, his skills can be compared to those of a surgeon, for both work under fixed and arduous rules. However, if the mapmaker is free to allocate varying populations to different districts, then the butcher's cleaver replaces the scalpel; and the results reflect sharply the difference in the method of operation." Hacker, Congressional Districting, 51 (1963).

argument already rejected, that considerations of practical politics can justify population disparities.

Missouri further contends that certain population variances resulted from the legislature's taking account of the fact that the percentage of eligible voters among the total population differed significantly from district to district—some districts contained disproportionately large numbers of military personnel stationed at bases maintained by the Armed Forces and students in attendance at universities or colleges. There may be a question whether distribution of congressional seats except according to total population can ever be permissible under Art. I, § 2. But assuming without deciding that apportionment may be based on eligible voter population rather than total population, the Missouri plan is still unacceptable. Missouri made no attempt to ascertain the number of eligible voters in each district and to apportion accordingly. At best it made haphazard adjustments to a scheme based on total population; overpopulation in the Eighth District was explained away by the presence in that district of a military base and a university; no attempt was made to account for the presence of universities in other districts or the disproportionate numbers of newly arrived and short-term residents in the City of St. Louis. Even as to the Eighth District, there is no indication that the excess population allocated to that district corresponds to the alleged extraordinary additional numbers of noneligible voters there.

Missouri also argues that population disparities between some of its congressional districts result from the legislature's attempt to take into account projected population shifts. We recognize that a congressional districting plan will usually be in effect for at least 10 years and five congressional elections. Situations may arise where substantial population shifts over such a period can be

anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them. By this we mean to open no avenue for subterfuge. Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner. Missouri's attempted justification of the substantial under-population in the Fourth and Sixth Districts falls far short of this standard. The District Court found "no evidence . . . that the . . . General Assembly adopted any policy of population projection in devising Districts 4 and 6, or any other district in enacting the 1967 Act." 279 F. Supp., at 983.

Finally, Missouri claims that some of the deviations from equality were a consequence of the legislature's attempt to ensure that each congressional district would be geographically compact. However, in *Reynolds* v. *Sims*, *supra*, at 580, we said, "Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing." In any event, Missouri's claim of compactness is based solely upon the unaesthetic appearance of the map of congressional boundaries that would result from an attempt to effect some of the changes in district lines which, according to the lower court, would achieve greater equality. A State's preference for pleasingly shaped districts can hardly justify population variances.

Affirmed.

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On Appeals From the United States District Court for the Western District of Missouri.

[April 7, 1969.]

MR. JUSTICE FORTAS, concurring.

I concur in the judgment of the Court in this case, but I cannot subscribe to the standard of near-perfection which the Court announces as obligatory upon state legislatures facing the difficult problem of reapportionment for congressional elections.

In *Wesberry* v. *Sanders*, 376 U. S. 1 (1963), this Court recognized that "it may not be possible to draw congressional districts with mathematical precision," and it held that the Constitution requires that they be drawn so that "as nearly as is practicable," each representative should cast a vote on behalf of the same number of people.

The Court now not only interprets "as nearly as practicable" to mean that the State is required to "make a good-faith effort to achieve precise mathematical equality," but it also requires that any remaining population disparities "no matter how small," be justified. It then proceeds to reject, *seriatim*, every type of justification that has been—possibly, every one that could be—advanced.

I agree that the state legislatures should be required to "make a good-faith effort to achieve" a result that

allocates the population or the residents[1] of the State in roughly equal numbers to each district, based upon some orderly and objective method.[2] In my view, the State could properly arrive at figures for current population by taking the latest census returns and making modifications to allow for population movements since the last census (which the Court seems to find acceptable). It could also, in my opinion, discount the census figures to take account of the presence of significant transient or nonresident population in particular areas (an adjustment as to which the Court indicates doubt). If the State should proceed on some appropriate population basis such as I have suggested, producing approximately equal districts, trial courts, in my judgment, would be justified in declining to disapprove the result merely because of small disparities, in the absence of evidence of gerrymandering—the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes.

In considering whether the State has "approximated" an equal division and allocation of the population, I sympathize with the majority's view that a "de minimis" rule of allowable disparities tends to demean in theory

[1] I would find it constitutionally entirely acceptable for a State to base its apportionment on numbers of residents, rather than total population, in each district at the time the districts are established. This would permit adjustments to take account, for example, of distortions resulting from large numbers of nonresidents at military installations or colleges in an area.

[2] In *Avery* v. *Midland County*, 390 U. S. 474, 495 (1968), I argued in a dissenting opinion that consideration of disparate local interests might be appropriate with respect to defining certain types of local government units exercising limited governmental powers. I noted there, however, that the same factors could not justify departing from the one man-one vote theory in state legislatures—or, I might now add, congressional districts—because of the general and basic nature of the function performed.

and in practice the constitutional objective because it suggests that it is not necessary even to aim at equality. On the other hand, to reject "de minimis" as a statement of the limits on the rule of equality should not lead us to toss aside the wise recognition of the inscrutability of fact and the imperfection of man which is implicit in the *Wesberry* standard: "as nearly as practicable." This phrase does not refer merely to arithmetical possibilities. Arithmetically, it is possible to achieve division of a State into districts of precisely equal size, as measured by the decennial census or any other population base. To carry out this theoretical possibility, however, a legislature might have to ignore the boundaries of common sense, running the congressional district line down the middle of the corridor of an apartment house or even dividing the residents of a single-family house between two districts. The majority opinion does not suggest so extreme a practical application of its teaching, and I mention it only because the example may dramatize the fallacy of inflexible insistence upon mathematical exactness, with no tolerance for reality.

Whatever might be the merits of insistence on absolute equality if it could be attained, the majority's pursuit of precision is a search for a will-o'-the wisp. The fact is that any solution to the apportionment and districting problem is at best an approximation because it is based upon figures which are always to some degree obsolete. No purpose is served by an insistence on precision which is unattainable because of the inherent imprecisions in the population data on which districting must be based. The base to which Missouri's legislature should have adhered precisely, according to the majority, is the 1960 decennial census. The legislature's plan here under review was enacted in 1967. Assuming perfect preci-

sion for the 1960 census when taken,[3] by 1967, because of the movement of population within the State as well as in-and-out migration, substantial disparities had arisen between the real distribution of population in the State and that reflected in the 1960 census base here so zealously protected by the Court.[4]

[3] The basic enumeration error in the census—that is the variation which would be observed between successive enumerations of the same area—is very low. Second surveys of selected areas, conducted by specially trained enumerators produced counts varying by only about 1% for the whole population from the counts of the regular enumerators. For particular groups in the population, the variance was significantly larger. See Bureau of the Census, Evaluation and Research Program, 1960 Census, Table 24, p. 22.

Far more significant than variations between successive enumerations are errors—virtually all undercountings—which are produced by the inherent limitations of the enumerating system. A Census Bureau estimate indicates that the 1960 census counted only 97.2% of the whole population, 2.8% of the people not being found and counted by the enumerators. Undercounting was not evenly distributed over the whole population. Instead, members of certain groups, notably young adult Negroes, were far more likely to be missed by the enumerators. For nonwhites in all age groups the census was estimated to understate the actual population by 8.2%. For young adult Negro males, undercounting reached nearly 20% for some five-year age groups. See generally, Siegel, Completeness of Coverage of the Nonwhite Population in the 1960 Census and Current Estimates, and Some Implications, Report, Conference on Social Statistics and the City, Washington, D. C. 13 (Heer ed., 1967). Because the heavily undercounted groups are not evenly distributed over the country, the differential rates of undercounting produce divergences between the actual relative populations of particular areas and those indicated by the census.

[4] The Census Bureau has estimated that of Missouri's 115 counties, 52 lost population between 1960 and 1966, while 63 gained. St. Louis City lost 57,900, or 7.7%; St. Louis County gained 146,000 or 20.8%. Outside St. Louis City and County, the absolute change ranged from a 22,100 increase in St. Charles County to a 7,100 decrease in Dunklin County. The percentage change ranged from a 41.7% increase in St. Charles County to a 21.4% decrease in Holt County. Estimates of the Population of Counties: July 1, 1966 (Report

Nothing that I have said should be taken as indicating that I do not believe that the *Wesberry* standard requires a high degree of correspondence between the demonstrated population or residence figures and the district divisions. Nor would I fix, at least at this relatively early stage of the reapportionment effort, a percentage figure for permissible variation.[5]

In the present case, however, I agree that the judgment of the District Court should be affirmed. The history of this reapportionment and of the legislature's failure to comply with the plain and patient directions of the three-judge District Court and the failure of the legislature to use either accurate 1960 census figures or other systematically obtained figures for all the districts—these factors strongly support the District Court's refusal to accept the Missouri plan. It is true that on the average, there was only a 1.6% variation from what the majority quaintly calls the "ideal" (meaning the 1960 census figures) and in only three of the 10 districts was there a variation of 2% or more, and it is also true that there is no finding of gerrymandering. But regardless of the possibility that variances within this range might in some situations be considered tolerable within *Wesberry*'s standard, I agree that we should sustain the District Court' rejection of the plan in light of the history of the case and the record of the plan's preparation.

No. 3), Current Population Reports, Population Estimates, Ser. P-25, No. 407 (Bureau of the Census, October 10, 1968), pp. 11–13.

[5] Cf. *Reynolds* v. *Sims*, 377 U. S. 533, 578 (1964):

"For the present we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative reapportionment."

SUPREME COURT OF THE UNITED STATES

Nos. 30, 31, AND 238.—OCTOBER TERM, 1968.

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David I. Wells, Appellant, v. Nelson A. Rockefeller, as Governor of the State of New York, et al.	On Appeal From the United States District Court for the Southern District of New York.

[April 7, 1969.]

MR. JUSTICE HARLAN, with whom MR. JUSTICE STEWART joins, dissenting.

Whatever room remained under this Court's prior decisions for the free play of the political process in matters of reapportionment is now all but eliminated by today's Draconian judgments. Marching to the nonexistent "command of Art. I, § 2" of the Constitution,[1] the Court now transforms a political slogan into a constitutional absolute. Strait indeed is the path of the righteous legislator. Slide rule in hand, he must

[1] See *Kirkpatrick* v. *Preisler*, *ante*, at 4; *Wells* v. *Rockefeller*, *ante*, at 4. I have discussed in my dissenting opinion in *Wesberry* v. *Sanders*, 376 U. S. 1, 20 (1964), the extraordinary historical leap involved in reading the straightforward constitutional provision that "The House of Representatives shall be composed of Members chosen every second year by the People of the several States . . ." as a command for equal districts.

avoid all thought of county lines, local traditions, politics, history, and economics, so as to achieve the magic formula: one man, one vote.

As my Brothers WHITE and FORTAS demonstrate, insistence on mathematical perfection does not make sense even on its own terms. Census figures themselves are inexact; our mobile population rapidly renders them obsolete; large groups of ineligible voters are unevenly distributed throughout the State. Nevertheless, the Court refuses to permit any room for legislative common sense to compensate for Census Bureau inadequacies. If no "scientific" data is available to justify a divergence from census figures, the Court holds that nothing can be done—"we mean to open no avenue for subterfuge." *Kirkpatrick* v. *Preisler*, at 9.

This all-pervasive distrust of the legislative process is completely alien to established notions of judicial review. See *Butler* v. *Pennsylvania*, 10 How. 402 (1850); *Davis* v. *Department of Labor*, 317 U. S. 249 (1942); *Fleming* v. *Nestor*, 363 U. S. 603 (1960). Nor does it have precedent in the prior reapportionment decisions themselves. "*Reynolds* v. *Sims*, . . . recognized that mathematical exactness is not required in state apportionment plans. *De minimis* deviations are unavoidable. . . ." *Swann* v. *Adams*, 385 U. S. 440, 445 (1966); see also *Wesberry* v. *Sanders*, 376 U. S. 1, 18 (1964).[2]

Even more important, the Court's exclusive concentration upon arithmetic blinds it to the realities of the political process, as the *Rockefeller* case makes so clear. The fact of the matter is that the rule of absolute equality is perfectly compatible with "gerrymandering" of the worst sort. A computer may grind out district

[2] While *Wesberry* cautions that "it may not be possible to draw congressional lines with mathematical precision," 376 U. S., at 18, it did not attempt to delineate the extent to which the States may properly deviate from the "ideal."

lines which can totally frustrate the popular will on an overwhelming number of critical issues. The legislature must do more than satisfy one man-one vote; it must create a structure which will in fact as well as theory be responsive to the sentiments of the community. On the record before us, however, there is absolutely no indication that the New York Legislature can satisfy this Court's demand for absolute equality and yet create a structure which will permit New York's multitude of political groups to have a fair chance at having their voices heard in Congress.

Even the appellants themselves do not suggest that it is possible to create a proper apportionment plan which is at the same time consistent with the demands of perfect mathematical equality. The plan they advance contemplates a maximum deviation of 4.7% from the state average, which represents an improvement of only 1.9 percentage points on the State's 6.6% deviation. Moreover, under the State's plan, a majority of the congressional delegation can represent no less than 49.3% of the population. The appellant's scheme "improves" this figure by .5%, increasing the number to 49.8%. See Appellant's Appendix D. Perfection, however, is still .2% away.

Although the appellant's plan offers such marginal benefits of voting egalitarianism, and although the record contains no suggestion of any other plan which even arguably permits the coherent expression of the popular will, the Court rejects the legislature's considered proposal simply because it seeks to remain true to traditional county and regional lines. In doing so, the majority ignores the salutary warning to be found in *Reynolds* v. *Sims*, 377 U. S. 533, 578 (1963): "Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." Yet,

today the Court condemns the legislature's approach because it "permit[s] groups of districts with defined interest orientations to be over-represented at the expense of districts with different interest orientations." *Wells* v. *Rockefeller*, at 4–5. Of course, all districting decisions inevitably involve choices between different interest groups. But as *Reynolds* recognized, legislatures prefer to follow traditional county and regional lines so that the demands of blatant partisanship will be tempered by the constraints of history and tradition. If the Court believes it has struck a blow today for fully responsive representative democracy, it is sorely mistaken. Even more than in the past, district lines are likely to be drawn to maximize the political advantage of the party temporarily dominant in public affairs.

We do not deal here with the hopelessly malapportioned legislature unwilling to set its own house in order. Rather, the question before us is whether the Constitution requires that mathematics be a substitute for common sense in the art of statecraft. As I do not think that the apportionment plans submitted by the States of New York and Missouri can properly be regarded as offensive to the requirement of equality imposed in *Wesberry*—a case whose constitutional reasoning I still find it impossible to swallow, but by whose dictate I consider myself bound—I dissent.

I would reverse the judgments of the District Court in the Missouri cases and affirm the decision of the District Court in the *Rockefeller* case.

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[April 7, 1969.]

MR. JUSTICE WHITE, dissenting.

I have consistently joined the Court's opinions which establish as one of the ground rules for legislative districting that single member districts should be substantially equal in population. I would not now dissent if the Court's present judgment represented a measurable contribution to the ends which I had thought the Court was pursuing in this area, or even if I thought the opinion not very useful but not harmful either. With all due respect, however, I am firmly convinced that the Court's new ruling is an unduly rigid and unwarranted application of the Equal Protection Clause which will unnecessarily involve the courts in the abrasive task of drawing district lines.

Accepting for constitutional purposes that a State may assign the task of apportioning its legislature or con-

gressional delegation to the legislature itself, I would not quibble with the legislative judgment if variations between districts were acceptably small. And I would be willing to establish a population variation figure which if not exceeded would normally not call for judicial intervention. As a rule of thumb, a variation between the largest and the smallest district of no more than 10 to 15% would satisfy me, absent quite unusual circumstances not present in either one of these two cases. At the very least, at this trivial level, I would be willing to view state explanations of the variance with a more tolerant eye.

This would be far more reasonable than the Court's demand for an absolute but illusory equality or for an apportionment plan which approaches this goal so nearly that no other plan can be suggested which would come nearer. As MR. JUSTICE FORTAS demonstrates, the 1960 census figures were far from accurate when they were compiled by professional enumerators and statisticians bent on precision, in 1960. Massive growth and shifts in population since 1960 made the 1960 figures even more inaccurate by 1967. That is why a new census is taken every 10 years. When the Court finds a 3% variation from substantially inexact figures constitutionally impermissible it is losing perspective and sticking at a trifle.

It also seems arbitrary for the majority to discard the suggestion of *Reynolds* v. *Sims*, 377 U. S. 533 (1964), that if a legislature seeks an apportionment plan which respects the boundaries of political subdivisions, some variations from absolute equality would be constitutionally permissible. Of course, *Reynolds* involved state legislative apportionment and took pains to say that there may be more leeway in that context. But the Court invokes *Reynolds* today and in no way distinguishes federal from state districting.

Reynolds noted that "[i]ndiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." 377 U. S. 533, 578-579. The Court nevertheless now rules that regard for these boundaries is no justification for districts which vary no more than 3% from the norm where another plan which may have no regard for district lines reduces the variation to an even smaller figure. I have similar objections to the Court's rejection of geographical compactness as an acceptable justification for minor variations among congressional districts. This rejection of the virtues of compactness will not be lost on those who would use congressional and legislative districting to bury their political opposition.

In reality, of course, districting is itself a gerrymandering in the sense that it represents a complex blend of political, economic, regional, and historical considerations. In terms of the gerrymander, the situation will not be much different if equality means what it literally says—a zero variation—rather than only "substantial" equality which would countenance some variations among legislative districts. Either standard will prevent a minority of the population or a minority party from consistently controlling the state legislature or a congressional delegation and both are powerful forces toward equalizing voter influence on legislative performance. In terms of effective representation for all voters there are only miniscule differences between the two standards. But neither rule can alone prevent deliberate partisan gerrymandering if that is considered an evil which the Fourteenth Amendment should attempt to proscribe.

Today's decision on the one hand requires precise adherence to admittedly inexact census figures, and on the

other downgrades a restraint on a far greater potential threat to equality of representation, the gerrymander. Legislatures intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality among districts using standards which we know and they know are sometimes quite incorrect. I see little merit in such a confusion of priorities.

Moreover, today's decision will lead to an unnecessary intrusion of the judiciary into legislative business. It would be one thing if absolute equality were possible. But, admittedly, it is not. The Court may be groping for a clean-cut, *per se* rule which will minimize confrontations between courts and legislatures while also satisfying the Fourteenth Amendment. If so, the Court is wide of the mark. Today's result simply shifts the area of dispute a few percentage points down the scale; the courts will now be engaged in quibbling disputes over such questions as whether a plan with a 1% variation is "better" than one with a larger variation, say 1.1% or even 2%. If county and municipal boundaries are to be ignored, a computer can produce countless plans for absolute population equality, one differing very little from another, but each having its own very different political ramifications. Ultimately, the courts may be asked to decide whether some families in an apartment house should vote in one district and some in another, if that would come closer to the standard of apparent equality. Using the spacious language of the Equal Protection Clause to inject the courts into these minor squabbles is an unacceptable pre-emption of the legislative function. Not only will the Court's new rule necessarily precipitate a new round of congressional and legislative districting, but I fear that in the long run the courts, rather than

the legislatures or nonpartisan commissions, will be making most of the districting decisions in the several States. Since even at best, with compact and equal districts, the final boundary lines unavoidably have significant political repercussions, the courts should not draw district lines themselves unnecessarily. I therefore dissent.